**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**AARON CLARK and JOHN PEIRANO,**

**Plaintiffs**

**v.**

**THE WALT DISNEY COMPANY, et al**

**Defendants.**

Case No. 08 cv 0982

Hon. John D. Holschuh

**DEFENDANT JAKKS PACIFIC, INC.'S SUPPLEMENTAL MOTION FOR ATTORNEYS FEES PURSUANT TO 35 U.S.C § 285 AND 28 U.S.C. § § 1927 AND 1961**

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## I. INTRODUCTION

Defendant JAKKS Pacific, Inc. ("JAKKS") files this Supplemental Motion for Attorneys' Fees Pursuant to 35 U.S.C. § 285 in support of its currently pending Motion for Attorneys' Fees Pursuant to Federal Rule of Civil Procedure 11 (the "Rule 11 Motion"). *See,* Dkt. #63. JAKKS filed its Rule 11 Motion while its Motion to Dismiss was pending, but before the Court entered judgment in Defendants'[1] favor. Now that the Court has entered judgment in Defendants' favor, Defendants are the prevailing parties within the meaning of 35 U.S.C. § 285, and, therefore, supplement the pending Rule 11 Motion with this Motion to raise JAKKS' entitlement to fees pursuant to section 285.

The facts set forth in detail in the Rule 11 Motion demonstrate that whether measured under a Rule 11 "frivolous" standard or the "exceptional case" standard of 35 U.S.C. § 285 discussed herein, JAKKS is entitled to an award of its attorneys' fees and costs incurred in this case. Plaintiffs have, at all times, known that this case was frivolous and that there were no circumstances under which Plaintiffs could have prevailed. Moreover, it is clear that Plaintiffs engaged in litigation misconduct by needlessly and recklessly running-up the cost of litigation in this case. Thus, the Court should enter an order (1) finding the case "exceptional" within the meaning of section 285, and (2) awarded JAKKS' its fees and costs in the amount of $200,702.34.

[1] The other named Defendants in this case are The Walt Disney Company, Play Along Toys, KB Toys, Toys "R" Us, Babyuniverse, Inc., eToys Direct, Inc., and Disney Shopping, Inc. Because all attorneys' fees in this case were paid by JAKKS, JAKKS is the moving party herein.

## II. SUMMARY OF FEES AND COSTS REQUESTED

For the Court's convenience, JAKKS' requested fees and expenses are set out in the table below.[2]

| **Category** | **Amount** |
|---|---|
| Attorneys' fees | $194,516.50 |
| Costs (not included in Bill of Costs) | $6,185.84 |
| **Grand Total** | $200,702.34 |

## III. FACTS

The facts supporting this Motion are set forth in detail in the Rule 11 Motion. In summary:

- Plaintiffs *never* had a reasonable expectation that they could prevail in this case because it was clear from a simple inspection of the accused products that the "housing surface" limitation could never be met. That is, the patent-in-suit, U.S. Patent No. 5,548,272 (the "'272 patent"), included a "housing surface" limitation that required that the housing surface be prepared with art that matched the art covered by the speaker housing. All Plaintiffs ever needed to do to confirm that this key limitation was missing was to *look at the product*. It was clear at the time Plaintiffs filed the Complaint—as it remained throughout this litigation—that the speaker housing was not prepared with any art, let along "matching art" as required by the claims of the '272 patent. Thus, no reasonable attorney at any time before Plaintiffs filed this case, after Plaintiffs filed this case, or while Plaintiffs pursued this case, would have ever believed that the accused products infringed.

[2] JAKKS' attaches to the Declaration of Grant Kinsel as Exhibits 1-2, detailed spreadsheets: (1) extracting all hours for attorneys' fees sought and applying the lodestar calculation; and (2) extracting all costs sought by this Motion.

- Plaintiffs were on notice that they could not prevail from the beginning of the lawsuit. Within days after serving the Complaint, Defendants served Plaintiffs with a motion under Federal Rule of Civil Procedure 11, demonstrating in detail why the Complaint was frivolous. Plaintiffs were unmoved by this the motion and refused to take advantage of Rule 11's safe harbor provision.

- When Plaintiffs refused to take advantage of Rule 11's safe harbor provision, Defendants immediately filed a Motion to Dismiss Pursuant to Rule 12(b)(6). *See,* Defs.' Mem. Supp. Mot. Dismiss (Dkt. #11). The Court converted this motion into a summary judgment motion, and on October 9, 2009, entered judgment in Defendants' favor. The Court's Memorandum Opinion & Order (the "Order") echos Defendants' original warnings to Plaintiffs: "When Claims 1 and 5 are read as a whole, and when all of the words defining the scope of the invention are given effect, these claims *unambiguously* require that the artwork on the surface of the housing be substantially the same as the artwork on that portion of the poster directly underneath the housing." *See,* Order at 10-11 (Dkt. #64) (emphasis added). The Court further found, "[a]lthrough the color of the housing unit generally complements the color scheme used in the poster, *clearly* the housing unit is not covered with artwork that is substantially the same as the poster artwork directly underneath it." *Id.* at 13 (emphasis added). This is *exactly* what Defendants had been telling Plaintiffs all along, and this is *exactly* what Plaintiffs refused to acknowledge all along.

- Throughout this case, Plaintiffs engaged in litigation misconduct directed to increasing the burden and cost of this case. The examples abound throughout this case and are described in detail in the Rule 11 Motion. At least one deserves special note: Plaintiffs' misrepresentation regarding title to the '272 patent. Plaintiffs alleged that Aaron Clark was the "*sole owner* of the '272 patent" and "has been and *still is* the rightful owner of *all* rights, title and interest to the '272 patent." *See,* Compl. at ¶¶ 29, 39 (Dkt. #2) (emphasis added); *see also* 1st Am. Compl. at ¶¶ 29, 39 (Dkt. # 28). The Complaint, however, attached a purported "assignment of license" that showed that the patent was assigned jointly to Clark and Peirano. Defendants requested that Plaintiffs amend the complaint to name the proper parties. But Plaintiffs refused, forcing Defendants to file a Rule 12(b)(7) motion to ferret out the truth of the ownership of the patent. While the motion was pending, Plaintiffs relented and amended the Complaint to properly name all of the owners of the patents. But by that point, the damage was done—Defendants had spent the time, energy and resources drafting the motion.

## IV. ARGUMENT

### A. Standards for Awarding Attorneys' Fees Under 35 U.S.C. § 285

Section 285 of the Patent Act provides that "[a] court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. The purpose of section 285 is two-fold. First, the statute permits an award of fees "where it would be *grossly unjust* that the winner be left to bear the burden of his own counsel which prevailing litigants normally bear." *Badalamenti v. Dunham's Inc.,* 896 F.2d 1359, 1364 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 851 (1990) (*quoting J.P. Stevens Co. v. Lex Tex Ltd.*, 822 F.2d 1047, 1052 (Fed. Cir. 1987) (emphasis in original)). Second, the statute deters parties from bringing bad faith litigation, which protects litigants, the courts, and the judicial process from abuse. *Mathis v. Spears*, 857 F.2d 749, 753-54 (Fed. Cir. 1988).

Attorneys' fees are available to the prevailing party under section 285, whether that party is the patentee or the accused infringer. *See, e.g., Eltech Sys. Corp. v. PPG Indus., Inc.*, 903 F.2d 805, 810-11 (Fed. Cir. 1990). Federal Circuit law governs the Court's determination as to whether a case is "exceptional" under 35 U.S.C. § 285, and the Federal Circuit has held that its law also applies to the calculation of fees and expenses under section 285. *See Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1343 (Fed. Cir. 2001); *Pharmacia & Upjohn Co. v. Mylan Pharm., Inc.*, 182 F.3d 1356, 1359 (Fed. Cir. 1999).

Deciding whether to award attorneys' fees under section 285 is a two-step process. First, the prevailing party must prove by clear and convincing evidence that, as a matter of fact, the case is exceptional. Second, if a case is found to be exceptional, the court must then determine whether an award of attorneys' fees is warranted. *See J.P. Stevens Co.*, 822 F.2d at 1050.

Exceptional circumstances include inequitable conduct before the PTO; vexatious, unjustified, and otherwise bad faith litigation; or the filing of a frivolous lawsuit. *See, e.g., Brasseler, U.S.A. I L.P. v. Stryker Sales Corp.*, 267 F.3d 1370, 1380 (Fed. Cir. 2001); *Bayer Aktiengesellschaft v. Duphar Int'l Research B.V.*, 738 F.2d 1237, 1242 (Fed. Cir. 1984).

Particularly apropos of this case, the Federal Circuit has elaborated that when "the patentee is manifestly unreasonable in assessing infringement, while continuing to assert infringement in court, an inference is proper of bad faith, whether grounded in or denominated wrongful intent, recklessness, or gross negligence." *Eltech Sys. Corp.*, 903 F.2d at 811. "The filing and maintaining of an infringement suit which the patentee knows, or on reasonable investigation should know, is baseless constitutes grounds for declaring a case exceptional under 35 U.S.C. § 285 and awarding costs, attorney fees, and expenses to the accused infringer." *Id.* at 810 (internal quotation omitted).

### B. This Case was Exceptional[3]

#### 1. Pursuing an Objectively Baseless Case Satisfies the Exceptional Case Standard

Pressing an objectively baseless claim—as Plaintiffs did in this case—satisfies section 285's exceptional case standard. For instance, just last month, the Eastern District of Kentucky was faced with a case indistinguishable from the present matter. In *iLor, LLC v. Google, Inc.*, No. 5:07-109-JMH, 2009 WL 3367391 (E.D. Ky. Oct. 15, 2009), after Google prevailed on its motion for summary judgment, Google moved for attorneys' fees pursuant to section 285, claiming that the case was exceptional because the plaintiff know or should have know that it could never support its infringement contentions. The court agreed. The court found that "[a]n exceptional case may be found where, as in this case, questions of noninfringement were 'not close,' which is clearly the situation presented here." *Id.* at *5. The plaintiff had asserted an infringement theory that was directly contrary to the theory asserted during prosecution of the patent, and, therefore, the court concluded "that this case was brought in objective bad faith and was frivolous based on iLOR's awareness of or, at best, willful blindness to, these flaws." *Id.* at *4.

Many other courts have similarly found that the exceptional case standard is satisfied by a plaintiff who presses a case that he knew or should have known could not succeed. For instance, attorneys' fees in excess of $4,500,000 were recently awarded in a case in which the plaintiff pressed a manifestly unreasonable claim. *ICU Med., Inc. v. Alaris Med. Sys., Inc.*, No. SA CV 04-00689 MRP (VBKx), 2007 U.S. Dist. LEXIS 34467 (C.D. Cal. Apr. 16, 2007), *aff'd*, 558 F.3d 1368 (Fed. Cir. 2009). In *ICU Med., Inc.*, the plaintiff had patents on valves with and without "spikes," and asserted both the "spikeless" and "spike" claims against the defendant. *Id.*

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[3] Section 285 permits attorneys' fees to be awarded to the "prevailing party." There can be no dispute that Defendants are the prevailing parties.

at *3 n.1. The defendant prevailed, demonstrating that its products did not have spikes. *Id.* The defendant filed a motion for attorneys' fees, which was granted. *Id.* at *52. The court found that, among other things justifying an award of fees under section 285, the plaintiff asserted an objectively frivolous claim construction position. Specifically, the court held that "ICU only sued on these 'spike' claims by asserting a frivolous construction of the term 'spike' … in an improper attempt to cover [defendant's] products." *Id.* at *25. The court further found:

> [A] reasonable attorney would not have construed the "spike" element in ICU's patents as it did, nor would he or she have believed that every claim limitation of the "spike" claims read on the accused Alaris products either literally or under the doctrine of equivalents. … In short, ICU's claimed construction of a "spike" … lacked dictionary or treatise support and omitted the pointed structure or piercing function that were clearly required by the asserted patents' claims, specification and drawings. No reasonable attorney would have thus found that the SmartSite Valve possessed a "spike" element, as defined by ICU's "spike" claims …. The "spike" claims should never have been asserted at all, from an objective standpoint.

*Id.*

Courts around the country have made similar findings. In *Refac Int'l, Inc. v. IBM Corp.*, 710 F. Supp. 569, 570 (D.N.J. 1989), aff'd, 13 U.S.P.Q.2d 1991 (Fed. Cir. 1989), the prevailing defendant moved for attorneys' fees. The court described "[t]he precise issue … [as] whether, in the context of the patent, random meant random with replacement or random without replacement." *Id.* at 570. The court reviewed the patent and the accompanying diagrams and found that "the word random could only mean random without replacement." *Id.* at 571. The court further found that "[d]espite the fact that the language and drawings of the patent dictated otherwise, plaintiff asserted throughout this litigation that the word random in the patent must mean random with replacement." *Id.* The court stated:

> The fact that plaintiff wishes some other result does not make it so. As [the court] said in [the court's] original decision, "words mean what they mean and not what

> we want them to mean." … Refac, to its peril, has attempted to enforce a patent which was not the one described in [the inventor's] patent application.

*Id. See, e.g., Multi-Tech, Inc. v. Components, Inc.*, 708 F. Supp. 615, 621-23 (D. Del. 1989) (holding that the patentee's proposed claim construction, in light of the prosecution history, was at least gross negligence, and thus made the case exceptional under 35 U.S.C. § 285); *F&G Research, Inc. v. Google Inc.*, No. 06-60905, 2007 U.S. Dist. LEXIS 70072, at *47-52 (S.D. Fla. Sept. 20, 2007) (awarding attorneys' fees where the patentee proposed a claim construction completely at odds with an earlier construction).

**2. This Case was Objectively Baseless from the Beginning and Plaintiffs Were Fully Aware of that Fact**

This was not a case of a plaintiff honestly mistaking that his patent was infringed. Nor was this a case dealing with sophisticated computer hardware that required detailed tear-down and expert analysis in order to reach a conclusion of noninfringement. This was a simple case in which Plaintiffs took a position contrary to positions taken during the prosecution of the patent, contrary to Plaintiffs' own product design, and contrary to any reasonable reading of the claims. There was unambiguously no way for the accused products to meet the patent's "housing surface" limitation, and, therefore, unambiguously no way for the accused products to infringe. Yet, just as the plaintiffs did in *iLOR, ICU*, and *Refac*, Plaintiffs in this case pressed ahead in face of the objectively impossible task of proving infringement.

Unlike the plaintiffs in *iLOR, ICU*, and *Refac*, however, the Plaintiffs in this case were on notice from *day one* of the impossibility of their task. Shortly after Plaintiffs filed the Complaint, Defendants sent—but did not file as required by Rule 11—a motion detailing exactly why the accused products could not infringe. Thus, even under the charitable assumption that the Plaintiffs did not know at the time they filed their Complaint that they could not prove infringement, Plaintiffs certainly knew within weeks and long before any substantial expenses were incurred. This is, therefore, not a case in which one must speculate as to whether the Plaintiffs knew that the Complaint was frivolous. They did. Yet, they continued to press the cases nevertheless. This is the very definition of an exceptional case within the meaning of section 285.

### C. JAKKS' Fees Were Reasonable and Should Be Awarded in Full

#### 1. Standards for Determination of Reasonable Attorneys' Fees

Courts determine the amount of fees awarded under 35 U.S.C. § 285 using the "lodestar" analysis. *See ICU Med., Inc. v. Alaris Med. Sys., Inc.*, No. SA CV 04-00689 MRP (VBKx), 2007 U.S. Dist. LEXIS 49094, at *6 (C.D. Cal. June 28, 2007), *aff'd*, 558 F.3d 1368 (Fed. Cir. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Under this approach, the court first determines a lodestar figure by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433. The reasonable hourly rate is usually determined by reference to the rates charged by lawyers in the same legal community with comparable skills and reputations. *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

This presumptively valid lodestar figure may be increased or decreased based on factors such as: (1) the novelty and complexity of the issues; (2) the special skill and experience of counsel; (3) the quality of representation; (4) the results obtained; and (5) the contingent nature of the fee agreement. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996). These factors may be considered by the Court to the extent that they are not already considered in the initial determination of a reasonable rate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045-47 (9th Cir. 2000).

### 2. The Number of Hours Expended Was Reasonable

From the inception of this case through the date of the Court's grant of summary judgment, JAKKS' counsel spent a total of 406 hours. The hours spent by each time-keeper are set out in the below table:

| Name | Title | Hours |
|---|---|---|
| Grant Kinsel | Partner | 112.4 |
| Michael Lueder | Partner (local counsel) | .5 |
| Lori Minassian | Associate | 19 |
| Michael Song | Associate | 261 |
| Jennifer Rosenberg | Summer Associate | 4.1 |
| Stephanie Matthews | Summer Associate | 9 |
| **Total** | | **406** |

The specific tasks billed for by each of the above-time keepers are described in detail in the invoices attached as Exhibit 3 to the Kinsel Declaration, and are summarized in Exhibit 1. Generally, the tasks fell into one of several categories: (1) the initial "safe harbor" Rule 11 motion and the subsequent (as filed) Rule 11 motion, (2) the 12(b)(6) motion to dismiss and the related supplemental briefing after the motion was converted into a motion for summary judgment, (3) personal jurisdiction with respect to The Walt Disney Company, (4) discovery, including discovery motions, and (5) the 12(b)(7) motion to dismiss. Each category of costs was entirely reasonable and is discussed below.[4]

#### a. Rule 11 Motions

As required by Federal Rule of Civil Procedure 11, to be entitled to its fees, and to provide Plaintiffs with the statutory safe harbor, JAKKS was required to serve Plaintiffs with an

[4] The hours spent on each task and described below. In certain cases, tasks described in counsel's bills fell into more than one category. Further, in some cases, tasks falling into multiple categories were block billed together. Therefore, while the total number of hours spent is exact, the division of those hours into tasks is approximate.

initial Rule 11 motion. This motion described in detail the basis for JAKKS' position that the case was frivolous and should be withdrawn.

Subsequently, in October 2009 while the Summary Judgment Motion was pending, JAKKS filed its Rule 11 Motion. This final motion required substantial preparation because of all of Plaintiffs' misconduct that occurred between the time of the original safe harbor motion and the time that the motion was ultimately filed. Thus, JAKKS' Rule 11 Motion exceeds fifty pages and provides detail as to all of Plaintiffs' misconduct throughout this case. JAKKS' counsel billed approximately 73.9 hours for these Motions.

**b. Motion to Dismiss**

In an effort to end this case early and minimize costs, JAKKS' counsel prepared and filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) Such motions are somewhat unusual in the context of a patent litigation matter, but given Defendants' obvious and indisputable infringement position, the motion to dismiss was the most efficient way to terminate this frivolous case.

Subsequently, the Court converted the motion to dismiss into a summary judgment motion and permitted Plaintiffs to file a supplemental brief, which they did. Plaintiffs' supplemental briefing and exhibits ran in excess of one hundred pages, including a supposed expert witness declaration. As detailed in the Rule 11 Motion, the Plaintiffs' supplemental summary judgment brief bore little resemblance to either the facts or law in this case. Nevertheless, Defendants were required to respond in detail. Defendants' counsel billed 148.3 hours in connection with the Motion to Dismiss/Summary Judgment briefing.

**c. Personal Jurisdiction Over The Walt Disney Company**

For reasons that continue to be mysterious, Plaintiffs insisted on trying to obtain personal jurisdiction over The Walt Disney Company even though it was perfectly clear that (1) personal jurisdiction was not appropriate because The Walt Disney Company was a holding company with no operations in Ohio, and (2) Defendants' counsel identified the Disney-related entity responsible for the sales of the accused posters. Thus, the entire exercise relating to The Walt Disney Company was utterly unnecessary, but was forced by Plaintiffs' intransigence and poor decision-making.

Because Plaintiffs refused to dismiss The Walt Disney Company, Defendants were forced to file a 12(b)(2) motion to dismiss for lack of personal jurisdiction. The Court denied the motion without prejudice, allowing Plaintiffs to take discovery and to re-brief the issue. Plaintiffs', in fact, propounded discovery, which required substantial hours to respond to, and then Plaintiffs moved to compel further responses. As with every other discovery motion—as described in more detail below and in the Rule 11 Motion—Defendants prevailed on *every single issue* before Magistrate Abel, and Plaintiffs' motion to compel was denied in its entirety.

Ironically, after forcing The Walt Disney Company to move to dismiss, respond to discovery and appear through counsel at a motion to compel, Plaintiffs agreed to do exactly what Defendants' counsel had suggested from the inception of the case with respect to The Walt Disney Company: enter a dismissal without prejudice. Nevertheless, Plaintiffs' vexatious approach required counsel to expend approximately 79.5 hours defending a party that should have never been before the Court.

**d. Discovery**

At every step along the way in this case, Plaintiffs refused to properly respond to discovery, necessitating serial motions to compel before Magistrate Abel. Indeed, it is worth noting that Defendants prevailed on every single issue in *every single discovery hearing*, whether it was compelling additional responses to pending discovery, or resisting Plaintiffs' calls to answer bizarre and wide-ranging discovery having nothing to do with the issues at hand.

Dealing with Plaintiffs' failure to understand and follow the discovery rules of this Court, required counsel to expend approximately 91.9 hours.

**e. 12(b)(7) Motion Regarding Ownership**

Apropos of Plaintiffs' total disregard for Defendants' costs, Plaintiffs refused to recognize that to pursue this case all owners of the patent-in-suit needed to be joined. Defendants informally notified Plaintiffs of this fact, directing Plaintiffs to the law demonstrating the point and inviting Plaintiffs to amend. Yet, Plaintiffs refused to voluntarily amend the Complaint, notwithstanding the fact that Plaintiffs had blatantly misrepresented ownership of the patent. Only after Defendants filed the motion did Plaintiffs "voluntarily" amend their complaint to name all owners of the patent. Nevertheless, Defendants' counsel was forced to expend another approximately 10.9 hours on yet another motion.

As the Court can see from the above descriptions, Defendants' counsel did everything within their power to reduce the costs of this case. Yet at every step along the way, Plaintiffs' counsel took the approach most likely to drive-up costs. Thus, Plaintiffs' counsel should not be heard to complain that the number of hours expended in connection with this case were unreasonable—all of the hours were the result of Plaintiffs' vexatious conduct.

**3. JAKKS' Counsel's Hourly Rates Were Reasonable**

Patent litigation is a specialized area of practice that typically commands rates higher than most areas of practice. Where, as here, a prevailing party "has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation …." *Hensley*, 461 U.S. at 435.

The hourly rates requested by JAKKS are reasonable. Below is a table listing the actual rates for Defendants' attorneys in this case, and those rates recently approved by courts in the Ninth Circuit where JAKKS is located and Defendants' counsel practices. *See Applied*

*Materials, Inc. v. Multimetrixs, LLC*, No. C 06-07372 MHP, 2009 U.S. Dist. LEXIS 44061, at *13 (N.D. Cal. May 26, 2009) (patent case);[5] *Love v. Mail on Sunday*, No. CV 05-7798 ABC (PJWx), 2007 U.S. Dist. LEXIS 97061, at *25 (C.D. Cal. Sept. 7, 2007) (copyright case).

| **Attorney Name** | **Title** | **IP Lit. Experience** | **Actual Hourly Rate** | ***Applied Materials* Approved Rates (2008)** | ***Love* Approved Rates (2007)** |
|---|---|---|---|---|---|
| Kinsel | Partner | 15 yrs. | $565 | $525-$650 | $540-$690 |
| Lueder | Partner | 22 yrs | $490 | $525-$650 | $540-$690 |
| Minassian | Associate | 7 yrs | $525 | $525-$650 | $540-$690 |
| Song | Associate | 5 yrs | $450 | $350-$420 | $305-$460 |

The Federal Circuit has approved use of the American Intellectual Property Law Association's ("AIPLA") Report of the Economic Survey (the "2009 Survey") in awarding fees under section 285. *See Mathis*, 857 F.2d at 755-56 (holding that the district court properly considered AIPLA surveys in deciding on reasonable rates). According to the 2009 Survey, the hourly billing rates for private firm intellectual property attorneys working in Los Angeles in 2008 ranged from $503 (25th percentile) to $619 (75th percentile) for partners, and $349 (25th percentile) to $419 (75th percentile) for associates. (See AIPLA 2009 Report of the Economic Survey at I-34, I-52 [Ex. 5].) Similarly, rates for partners for 2008 in Chicago ranged from $445 (25th percentile) to $521 (75th percentile), and for associates from $298 (25th percentile) to $359 (75th percentile). (Id.) In short, JAKKS' counsels' hourly rates were clearly reasonable.

**4. Application of the Lodestar**

The lodestar is determined by multiplying the reasonable number of hours by the reasonable hourly rate. The table below applies this methodology to determine JAKKS' base recoverable attorneys' fees:

[5] The rates approved by the Court in Applied Materials were attached to a declaration in support of the motion for attorney fees. (*See* Singla Decl. in Support of Motion for Attorney Fees at ¶ 12 [Ex.4].)

| **Timekeeper** | **Reasonable Rate** | **Reasonable Hours** | **Subtotal by Timekeeper** |
|---|---|---|---|
| Kinsel | $565 | 112.4 | $63,506 |
| Leuder | $490 | .5 | $245 |
| Minassian | $525 | 19 | $9,975 |
| Song | $450 | 261 | $117,450 |
| Rosenberg | $255 | 4.1 | $1,045.50 |
| Matthews | $255 | 9 | $2,295 |
| **TOTAL** | | **406** | **$194,516.50** |

### D. JAKKS Is Also Entitled to its Costs as Well as Pre- and Post – Judgment Interest

#### 1. JAKKS Is Entitled to its Costs

"The purpose of § 285 is, in a proper case and in the discretion of the trial judge, to compensate the prevailing party for its monetary outlays in the prosecution or defense of the suit." *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1578 (Fed. Cir. 1983). Accordingly, under 35 U.S.C. § 285, JAKKS is entitled to the expenses it incurred in the "preparation for and performance of legal services related to the suit." *Mathis*, 857 F.2d at 757 (*quoting Central Soya Co.*, 723 F.2d at 1578).

These recoverable expenses include: (1) legal research, *see Tehrani*, 2001 U.S. Dist. LEXIS 26067, at *8-9; *Auto. Prods. PLC v. Tilton Eng'g, Inc.*, 855 F. Supp. 1101, 1106-07 (C.D. Cal. 1994); (2) staff overtime, *see Mathis*, 857 F.2d at 759; *Tehrani*, 2001 U.S. Dist. LEXIS 26067, at *7-8 (*citing Missouri v. Jenkins*, 491 U.S. 274, 285 (1988)); *Auto. Prods. PLC*, 855 F. Supp. at 1106-07; and (3) other miscellaneous expenses such as messenger services, mail costs, parking, teleconference fees, librarian and paralegal services. *See Tehrani*, 2001 U.S. Dist. LEXIS 26067, at *7-8 (citing Missouri, 491 U.S. at 285); *Auto. Prods. PLC*, 855 F. Supp. at 1106-07; *GT Dev. Corp. v. Temco Metal Prods. Co.*, No. C04-0451Z, 2005 U.S. Dist. LEXIS 37501, at *9-10 (W.D. Wash. Aug. 31, 2005).

The expenses incurred by JAKKS that are not part of JAKKS' Bill of Costs, are set forth in detail in Exhibit 3. A summary of expenses is shown in Exhibit 2. JAKKS incurred, $402.60 in copying costs, $4,896.07 in legal research, $357 for paralegal services, $280.50 for document management personnel, $42.16 in shipping costs, $10.51 in mailing costs, and $197 to obtain the file history for the '272 patent.[6] JAKKS' total costs, excluding those recoverable pursuant to the Bill of Costs, were $6,185.84. All of these costs are reasonable and recoverable.

**2. JAKKS Is Entitled to Pre and Post-Judgment Interest**

28 U.S.C. § 1961 provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court …. Such interest shall be calculated from the date of the entry of the judgment." "Any judgment" in § 1961 includes a judgment awarding attorneys' fees. *Mathis*, 857 F.2d at 760; *see also ICU Med., Inc.*, 2007 U.S. Dist. LEXIS 49094, at *18; Tehrani, 2001 U.S. Dist. LEXIS 26067, at *10.

The Court also has the authority in cases of bad faith or other exceptional circumstances to award prejudgment interest on the unliquidated sum of an attorneys' fee award made under 35 U.S.C. § 285. *Mathis*, 857 F.2d at 761; *Joyal Prods., Inc. v. Johnson Elec. N. Am., Inc.*, No. 04-5172 (JAP), 2009 U.S. Dist. LEXIS 15531, at *27-29 (D.N.J. Feb. 26, 2009); *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, No. 98 Civ. 7766 (PAC), 2008 U.S. Dist. LEXIS 54615, at *61 (S.D.N.Y. July 17, 2008); *Gardiner v. Gendel*, 727 F. Supp. 799, 806 (E.D.N.Y. 1989), *aff'd*, 976 F.2d 746 (Fed. Cir. 1992).

The Court should award JAKKS pre and post-judgment interest.

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[6] This last costs—the '272 patent file history—is another ironic cost. Defendants were forced to obtain this file history on their own, when it turned out that Plaintiffs did not have a copy of it. The fact that Plaintiffs did not even have a copy of the full history for the patent they purported to sue on, demonstrates yet again the cavalier attitude with which Plaintiffs approached this case.

## V. CONCLUSION

For all of the reasons stated herein, the Court should grant JAKKS' its attorneys' fees and costs incurred in this action in an amount of $200,702.34 plus pre and post-judgment interest thereon.

Dated: November 10, 2009

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system upon counsels of record.

/s/ Grant E. Kinsel
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